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IN THE

Supreme Court of the United States

JANUARY TERM 1975

No. 74-1136

IN THE MATTER OF
ALAN B. CLARK, PANSY K. CLARK, individually,
PAUL CLARK, an infant by his Guardian ad Litem,
PANSY K. CLARK, and RUTH CLARK, an infant by
her Guardian Ad Litem PANSY K. CLARK,

Petitioners,

vs.

JERRY STANKIVIC and
THE UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

MARVIN S. DAVIDSON,
Attorney for Petitioners,

90 So. Main Street,
Orange, New Jersey 07050
(201) 677-9127

N. J. Appellate Printing Co., Inc., Woodbridge, N. J. (201) 636-2030

TABLE OF CONTENTS

Opinion Below 1

Jurisdiction 3

Questions Presented 4

Statement of Facts 5

REASONS FOR GRANTING THE WRIT:

POINT I: The plaintiffs have substantially complied with all aspects of the Federal Tort Claims Act requirements and should not be barred from their day in Court. 7

POINT II: The attorney's failure to file the completed form 95 with sum certain constitutes excusable neglect under *Rule* 60(b). Alternatively, said failure is a clerical mistake under Rule 60(a) 9

POINT III: The Court, in all equity and fairness, can consider changes in the law and, alternatively, can overturn a legal principle where the equity powers of the Court are called upon, where failure to do so would be both unfair to the plaintiffs and a denial of equal protection under the laws 20

Conclusion 26

CASES CITED:

Avril v. U.S.,
461 F.2d 1090 (1972) 7, 8

Barber v. Turberville,
218 F.2d 34 (1954) 11, 18

TABLE OF CONTENTS

CASES CITED:

Berea College v. Kentucky,
211 U.S. 45 22

Bialowas v. U.S.,
3 Cir. 443 A.2d 1047 (1971) 2, 8

Bittman v. U.S.,
341 F.2d 737, cert. denied 382 U.S. 941 (1965) .. 21

Blanchard v. Terry & Wright,
218 F. Supp. 910 (1960) 12

Brown v. Bd. of Education v. Topeka, Kansas,
347 U.S. 483 (1955) 22, 23

Cong Lum v. Rice,
273 U.S. 78 22

Cox v. Livingston,
407 F.2d 392 (2d Cir. 1969) 15

Cummings v. County Board of Education,
175 U.S. 5281 22

Driggers v. U.S.,
309 F. Supp. 1377 8

Eccles v. Peoples Bank,
333 U.S. 426, 50 Geo. L.J. 315 7

Helj v. U.S.,
449 F.2d 124 8

Hood v. McConemy,
53 R.F.D. 435 22

Indian Towing Co. v. U.S.,
350 U.S. 61 9

TABLE OF CONTENTS

CASES CITED:

James Blackstone Memorial Association v. Gulf M. & O.R. Company,
28 F.R.D. 385 12

Janousek v. Doyle,
C.A.S.D. 313, F.2d 916 (1963) 11

Little v. U.S.,
317 F. Supp. 8 (D.C. Pa. 1970) 12-13

Lockhard v. U.S.,
420 F.2d 1143 7

Loving v. Virginia,
388 U.S. (1967) 23

McKart v. U.S.,
395 U.S. 183 15

Moore v. Coals Co.,
270 F.2d 410 (1959) 12, 16

Parapoff v. Vollstedts, Inc.,
267 F.2d 862 (1959) 19

Punman v. U.S.,
34 F.2d 737 25

Plessy v. Ferguson,
163 U.S. 537 (1896) 22, 23

Rabousky v. U.S.,
265 F. Supp. 567 (D.C. Conn. 1967) 14

Radack v. Norwegian Amer. Line Agency,
318 Fed. 538 (1963) 19

TABLE OF CONTENTS

CASES CITED:

Renman v. Shubow,
413 F.2d 258 (1969) 19

Rinieri v. News Syndicate Co.,
385 F.2d 818 (2d Cir. 1967) 18

Ry. Emp. Dept. AFL-CIO v. Wright,
81 S. Ct. 368, 364 U.S. 642 22

Smith v. Jackson Tool & Die Inc.,
426 F.2d 5 (1970) 12

Schwarz v. U.S.,
385 F.2d 833 19

Trueblood v. Grayson Shops,
32 F.R.D. 148 (E.D. Va. 1963) 19

U.S. v. Glenn,
231 F.2d 884, cert. denied 252 U.S. 928 (1888) .. 21

U.S. v. Sherwood,
312 U.S. 584 (1941) 2

U.S. v. Roth,
164 F.2d 575 (2d Cir. 1948) 14

Wexler v. Newman,
311 F. Supp. 906 (E.D. Pa. 1970) 17

Wolfsohn v. Raab,
11 F.R.D. 254 (1951) 19

STATUTE CITED:

28 U.S.C. §2672 ..... 11, 13

TABLE OF CONTENTS

RULES CITED:

R. 55 11

R. 59 10

R. 60 ..... 4, 9, 10, 11, 12, 13, 14, 15, 18, 19

AUTHORITY CITED:

Moore, Federal Practice 14

MISCELLANEOUS CITED:

13 A.L.R. F.E.D. 756 7

APPENDIX "A"

Opinion of the United States Court of Appeals 1a

SUPREME COURT OF THE UNITED STATES

JANUARY TERM 1975

No. 74-1136

IN THE MATTER OF

ALAN B. CLARK, PANSY K. CLARK, individually PAUL CLARK, an infant by his Guardian ad Litem, PANSY K. CLARK, and RUTH CLARK, an infant by her Guardian Ad Litem PANSY K. CLARK,

Petitioners,

vs.

JERRY STANKEVIC and
THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioners pray that a Writ or Writs of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Third Circuit for the decision made and entered in the above entitled cause on October 11, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit, announced on October 11, 1974, is as follows:

> "The above cause having been submitted to the Court and the Court being of the opinion after full consideration, that the district court did not err in dismissing the plaintiffs' complaint with prejudice, since

it appears that the plaintiffs failed to file within the time required by 28 U.S.C. §2401(b) an administrative claim in the form required by 28 U.S.C. §2675(a) and C.F.R. §14.2(a) and that strict compliance with those requirements is jurisdictional. *United States v. Sherwood*, 1941, 312 U.S. 584; *Bialowas v. United States*, 3 Cir. 1971, 443 A.2d 1047.

It is ADJUDGED and ORDERED that the judgment of the district court be, and it hereby is, affirmed.

Costs taxed against appellants.

By the Court.
ALBERT B. MARIS
Circuit Judge

JURISDICTION

Jurisdiction in this matter is predicated upon the fact that the issue concerns itself with the Federal Tort Claims Statute and the decision of the Circuit Court of Appeals did not consider the issues presented in the Brief that was submitted, and the Circuit Court of Appeals has so far departed from the accepted and usual course of proceedings wherein an oral hearing is first requested; the Petitioners prepare for said oral proceeding and then the oral proceeding is denied; as to call for an exercise of this Court's power of supervision.

QUESTIONS PRESENTED

The questions presented, which were incorrectly resolved by the District Court and the Third Circuit Court of Appeals are:

(1) Does strict interpretation of the Federal Tort Claims Act, requiring that a Sum Certain be stated, work a hardship on the injured parties wherein the exact amount of money damages cannot be ascertained, and, is this denial of "equal protection" to seriously injured victims, as opposed to those whose injuries are less serious and lend themselves to evaluation.

(2) Does substantial compliance with all of the aspects of the Federal Tort Claims Act requirement prevent a dismissal of an otherwise valid claim in negligence.

(3) Does failure to file a Sum Certain constitute excusable neglect under *Rule* 60(b) or, alternatively, does said failure constitute a clerical mistake under *Rule* 60(a) to allow for a Court to exercise equitable powers in allowing the plaintiffs their day in Court.

(4) Is the Federal Tort Claims Statute, in view of H.R. 10575 which will allow for a tolling of the Statute of Limitations for infants, unduly harsh on infant plaintiffs, particularly where the infant is born after the accident and where his injuries were not able to be determined within the time period allowed by the Statutes.

STATEMENT OF FACTS

Plaintiff instituted this suit in tort against the Federal Defendant by Summons and Complaint filed in the United States District Court for the District of New Jersey, on August 16, 1973.

The incident upon which this suit is based is an accident which occurred on August 17, 1970, in which the four plaintiffs, Alan B. Clark, Pansy K. Clark, and two infant children, Ruth Clark and Paul Clark, were injured.

The plaintiffs were, at all times prior to the Dismissal Order on December 8, 1972, represented by Maurice R. Strickland, Esq., or Donald E. King, Esq. The defendants have through the particular Insurance Company issuing coverage for the government vehicle in question, employed the adjustment firm of A. A. Miele, Inc., of Bloomfield, New Jersey, to negotiate with the attorney for the plaintiff; and, to adjust and investigate this particular claim. As early as August 31, 1970, the Miele Adjusting Company paid the property damaged involved in this cause of action.

The two aforementioned attorneys discussed the different aspects of the within case and settlement of the property damage case with different members of the offices of the Judge Advocate General at diverse times. Discussions were with the Office of the Judge Advocate General Department of the Army in Washington and with the Department of the Army at Fort Dix, New Jersey. At various times, there were discussions of settlement with the different officers of the Army at Fort Dix, New Jersey, and in Washington, D.C.

Additionally, attorney Strickland made other numerous telephone calls to the Department of the Army, located in Brooklyn, New York.

On December 14, 1970, attorney Strickland advised the Department of the Army that one of the plaintiffs was pregnant on the date of the accident and that, under New Jersey Law, the driver and passengers could not be represented by the same attorney.

Furthermore, attorney Strickland advised the Department of the Army that all the parties were still being treated and that the estimated damages could not be determined.

The plaintiff, Pansy K. Clark, gave birth on January 24, 1971 to a child several months after the accident. As of this date, March 6, 1975, the child, Jason Clark, age four years, is apparently suffering from the type of focal seizures that come from a trauma. Tests cannot be considered conclusive because of the age of the child. This should also be considered in view of the abortion verdict in Boston concerning a fetus aborted in the second tri-mester, where the fetus was considered a person.

The facts in the within case are distinguishable from the *Bialowas* case because in that case the plaintiff was unrepresented; that specific plaintiff told the Government he wanted only a few dollars and the Complaint was not filed for the *adult* plaintiff until more than two and one-half years after the date of the accident.

The plaintiffs in this case were represented by counsel; the Government knew the area of negotiations; there are infant plaintiffs and the *Complaint was filed within two years after the accident.*

REASONS FOR GRANTING THE WRIT

POINT I

The plaintiffs have substantially complied with all aspects of the Federal Tort Claims Act requirements and should not be barred from their day in Court.

There has been *substantial* compliance by the plaintiffs with all applicable statutes. The *essential purpose* of the regulations requiring a statement of a specific sum claim is to enable a determination by the head of the Federal Agency as to whether the claim falls within the jurisdictional limits of the particular agency to properly settle or properly adjudicate. If the claim is beyond a $25,000.00 limit, approval from the Attorney General of United States must be sought, 13 ALR FED 756. "Jurisdiction in the Federal Courts exists even though there has not been an exhaustion of an administrative remedy where there has been or might be immediate and irreparable injuries to person or property." *Eccles v. Peoples Bank*, 333 U.S. 426; 56 Geo. L.J. 315, *Lockhard v. U.S.*, 420 F.2d 1143. The leading case relied on by the government is *Bialowas v. U.S.*, 443 F.2d 1043, (5 Cir. 1973). However, *dicta* in the *Bialowas* decision indicates that the Court was aware that no information was supplied by which a *specific amount could be computed, this perhaps implies that the furnishing of such information might possibly cure the defect* (emphasis supplied). In the instant case, there were actual negotiations between the attorney, Donald King, Esq., and the Government. Additionally, there was the offer of Maurice Strickland, Esq., to go to Washington, D.C. for *negotiations*. In the *Bialowas* case, the only indication to a specific sum was the plaintiff's statement that he wanted a few thousand dollars for his suffering. See also *Avril v. U.S.*, 461 F.2d 1090 (1972). In *Avril*, a case involving

personal injuries to a motorcycle driver and his passenger, the Court stated: "It is plain that the required claim is something more than mere notice of accident or injury. The term (claim) contemplates in general use, demand for payment over relief and unless it is a claim for something, it is no claim at all." *Avril, supra.* Obviously, there is a claim for something when plaintiff is represented by two attorneys who negotiate with a representative of the Government and when the Government itself hired an investigating firm to adjust the claim for property damage. Certainly, the *dicta* in *Bialowas, supra,* and the decision in *Avril* indicate that substantial compliance is acceptable to the processing of a claim. Attention is also called to the letter from Maurice Strickland dated December 14, 1970.

See also the case of *Helj v. U.S.*, 449 F.2d 124, where the Court allows filing with the State Agency to be considered to be filed with the agency of the U.S. Government. Also 28 CFR 14 2(a): "If a claim is presented to the wrong agency, that agency should transfer it forthwith to the appropriate agency." The obvious purpose of *Avril, Heli,* and the *dicta* of *Bialowas* is to effectuate the non-immunity purpose of the Statute. Also, in *Driggers v. U.S.* 309, F. Supp. 1377, which is cited in the Government's Brief below, there was language "even if the letter from the plaintiff's attorney were considered administrative claims . . . the *Driggers* case hinged on a denial by the Government and whether there was, in fact, a denial." The language was that even if the letters from the plaintiff's attorney were considered to be administrative claims, the claim submitted by the general service administration did not constitute a denial of the plaintiff's claim since it was not sent by Registered or Certified Mail. *Driggers v. U.S., supra.*

The requirements for full compliance with the Federal Tort Claims Statute should be interpreted as to provide a

plaintiff or plaintiffs an opportunity to have their case heard *on its merits* (emphasis supplied) when there is a substantial compliance with the Statute, the plaintiff should not be prejudiced and prevented from presenting their particular claim. Justice Frankfurter's remarks are particularly pertinent at this juncture in referring to the Federal Tort Claim Act:

> "Of course when dealing with a Statute subjecting the Government to liability of potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it (the Court), as a self-constituted guardian of the treasury, import immunity *back into a Statute designed to limit it*," *Indian Towing Co., v. U.S.*, 350 U.S. 61.

Point II

The attorney's failure to file the completed form 95 with sum certain constitutes excusable neglect under *Rule* 60(b). Alternatively, said failure is a clerical mistake under *Rule* 60(a).

The plaintiffs accept the doctrine that The Federal Tort Claims Act is Jurisdictional, as opposed to being procedural only. The plaintiffs further accept the doctrine that there is no absolute right to sue the Sovereign. Plaintiffs contend that these doctrines should be considered in view of the overall purpose of the Federal Tort Claims Act, the Federal Rules of Civil Procedure and the remedial concept that a Sovereign should not be immune for all acts that a private citizen would be held responsible for. The appellants now call to the Court's attention *Rule* 60 of the F.R.C.P., entitled, *"Relief from Judgment or Order."*

Rule 60. Relief from Judgment or Order (a) Clerical Mistakes. Clerical Mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of any party and after such notice, if any, as the Court orders. During the pendency of an Appeal, such mistakes may be so corrected before the Appeal is docketed in the Appellate Court, and, thereafter, while the appeal is pending may be so corrected with leave of the Appellate Court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence, Fraud, etc.

On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which, by due diligence could not have been discovered in time to move for a new trial under *Rule* 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3), not more than one year after the judgment, order, proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title

> 28, U.S.C., §1655, or to set aside a judgment for fraud upon the Court. Writs of Coram Nobis, Coram Vobis, Audita Querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

The filing of timely and sufficient notice of appeal transfers jurisdiction of the case to the Court of Appeals and district court is without further jurisdiction to proceed further in case, except in aid of appeal, or to correct judgment or order, or mistake, excusable neglect or fraud. *Janousek v. Doyle,* C.A.S.D. 1963, 313 F.2d 916. Additionally, *Rule* 60 and *Rule* 55, providing for setting aside of default and judgment should be given liberal construction. *Barber v. Tuberville,* 218 F.2d 34 (1954).

In contrast to the strictly construed statute, 28 U.S.C. §2672, the rules and statute cited above are broadly constructed remedies designed to provide relief from judgment occasioned by a mistake or omission by the court or one of the parties. It should additionally be noted that §1653 makes special reference to amendment of pleadings defective in their allegations of jurisdiction.

Rule 60(a) applies to clerical errors of form, while the latter portion, *Rule* 60(b) provides for relief from matters of a substantive nature. These two subsections are held to be mutually exclusive and relief cannot be claimed under both.

In re Merry Queen Transport Co., involved a court mistake to add interest to a judgment as provided for by New York Statutory Law. In ruling claimant's motion to correct the judgment under *Rule* 60(a), the court defined the term "clerical mistake" and differentiated between the applicability of *Rule* 60(a) and 60(b).

The Court wrote:

> The term "clerical mistake" does not mean that it must be made by a clerk. The phrase merely described the type of error, identified with mistakes in transcription, alteration or omission of any papers and documents which are traditionally handled or controlled by clerks but which papers or documents may be handled by others. It is a type of mistake or omission mechanical in nature which is apparent on the record and which does not involve a legal decision, a judgment by an attorney. The clerical mistake under *Rule* 60(a) may be differentiated from the mistake or inadvertence referred to in *Rule* 60(b)(1) upon the ground that the latter applies to errors or omissions committed by an attorney or by the court which are not apparent on the record. See 7 Moore, Federal Practice, §60, 22 (2) at 230 (2d ed.).

Rule 60 gives broad equitable powers and vests power adequate to enable courts to vacate judgments wherever such action is appropriate to accomplish justice. *James Blackstone Memorial Association v. Gulf M. & O.R. Company,* 28 FRD 385. See also, *Smith v. Jackson Tool & Die, Inc.,* 426 F.2d 5 (1970). This section provided that defective allegations of jurisdiction may be amended upon terms in the trial or Appellate Courts and is intended to be made applicable to principles of venue and jurisdiction, and the intention of Congress is to permit amendment broadly *to avoid dismissal of suits on technical grounds* (emphasis supplied). *Moore v. Coals Co.,* 270, F.2d 410 (1959), also, *Blanchard v. Terry & Wright,* 218 F. Supp. 910 (1960).

An example of a court's willingness to grant relief of this kind where failure to state a sum certain was the result of a clerical error appears in *Little v. United States,*

317 F. Supp. 8 (D.C. Pa. 1970). Here plaintiffs filed an injury claim with the Post Office Department and entered the amount in sum certain on Form 95 as $1,391.00. By additional correspondence, plaintiff's attorney had asked for $8,500.00 in settlement of the entire claim. No administrative settlement was reached and, in an action by the claimant under the Federal Tort Claims Act, the Government moved to reduce the claim to $1,391.00. The question before the court was the true amount of the claim, and in response, the court said:

> "The unique legal issue in this case is whether where the Government knows a mistake has been made and where the Government had precise prior notice of the true demand, does the Statute (28 U.S.C. §2675) require the Government to be the unintended beneficiary of patent clerical error. Such harshness is not required."

The Court here found that $1,391.00, as entered on Form 95, was contended to represent only medical expenses, not the full claim, and, apparently, was entered due to the failure of counsel to scrutinize Standard Form 95.

Curiously, here, as an example of a clerical error, the court cites *Rabousky v. United States*, 265 F. Supp. 587 (D.C. Conn. 1967), where a sum of $25.00 was entered rather than an intended claim amounting to $2,500.00. This would seem more clearly a clerical error than the failure of the attorney in *Little* to understand Form 95 and its requirements. It may well be, however, that the *Little* court intended to expand the application of *Rule* 60(a) especially where the Government had the knowledge of plaintiff's full claim. Here, it seems that *Little* evidences the court's disposition to provide equitable relief on Federal Tort Claim cases under *Rule* 60(a), not only where

plaintiffs have been the victim of a simple clerical mistake, but also of ***neglect of counsel.*** (emphasis supplied) It should be noted, though, that in *Little,* a full claim had been communicated to the Government by other written correspondence (as contrasted to the verbal communication in *Bialowas,* perhaps) such that in order to enjoy the benefit of this decision, it might need be shown in the instant case that the full amount of the claim was in some way communicated to the Department of the Army in the course of ongoing negotiations.

It appears that the Federal *Rules* 60(a) and 60(b) apply not only to the records of the actual court proceedings, but to documents drawn by or presented to administrative bodies. Moore's *Federal Practice* broadly construes the term "in the record," as used in the rule to include "evidentiary documents . . . . or, in other words, to all things of which there is a record in the action." *6 Moore's supra,* at 60.06. Thus, the defect in the form submitted in the present case might be considered a document before the court and, thereby, subject to correction.

United States v. Roth, 164 F.2d 575 (2d Cir. 1948), was an appeal by the United States from an Order expunging a claim for 1938 income taxes erroneously described as income for the year 1939 owed by a bankrupt. It was agreed that the bankrupt owed nothing for the year 1939, but rather the claim by the United States was erroneous due simply to a clerical mistake. Characterizing the error as such, the referee at the bankruptcy hearing allowed amendment in reliance upon *Rule* 60(a), but on review the district court denied such leave to amend. On appeal it was found that the district court abused its discretion and the referee's decision to allow amendment was upheld. The court said on this matter, that "liberality in the amend-

ment of claims in bankruptcy has been the trend of our recent decisions." *Id.* at 577. Construed more broadly, this decision is exemplary of the fact that *Rule* 60(a) applies to permit amendment at administrative hearings.

The within case was dismissed based on lack of jurisdiction for failure to proceed administratively. The Government was not intended by Congress to benefit from the technical omission to the detriment of persons with substantial claims or where a more justifiable result would require a liberal interpretation of the Rules. "The doctrine of exhaustion of administrative remedies is like most judicial theories, subject to numerous exceptions." *McKart v. U.S.*, 395 U.S. 183. In *McKart*, a selective service case where the U.S. Supreme Court, in a six to three majority decision held, "the petitioner was entitled to an exemption from military service as a sole surviving son, not withstanding that his mother had died and his failure to appeal his (1-A) re-classification, and failure to report for his pre-induction physical, did not bar a challenge to the validity of such re-classification, as a defense to his criminal prosecution for refusal to submit to induction. Where jurisdiction, in fact, exists, but where through technical error, allegations of such jurisdiction are lacking, such may be amended to permit an action to continue if it is at all possible to construe from the record that jurisdiction does, in fact exist." *Cox v. Livingston*, 407 F.2d 392 (2nd Cir. 1969). In *Cox* multiple plaintiffs commenced a diversity action in federal court for injuries sustained in an auto accident. Two individual plaintiffs sought to amend an initial claim of $7,500.00 each to $15,000 00 each and thus meet the jurisdictional requirement of a $10,000.00 claim. In permitting this amendment based on 28 U.S.C., §1653, the Court wrote.

> An application under §1653 is . . . addressed to the discretion of the court and usually the section is to be construed liberally to permit the action to be maintained if it is at all possible to determine from the record that jurisdiction does, in fact, exist.

Id. The Court, citing Moore's treatise on federal practice, thereby reminded the reader again that "the record" should be broadly construed and thereby §1653 would permit amendment of documents at prior administrative proceedings. Here the Court looked to the facts as alleged by plaintiff and found no legal certainty that plaintiff could not recover in excess of $10,000.00 and, therefore, permitted amendment. Thus, the court exercised extremely broad discretion in taking jurisdiction on the basis of an amendment to an otherwise defective claim.

Such a broad exercise of discretion is present in *Moore v. Coals*, 270 F.2d 410 (3d Cir. 1959). *Moore* involved the failure of a plaintiff appearing *pro se* to allege diversity jurisdiction in a patent infringment proceeding brought in federal court. Here the court again permitted amendment (noting plaintiff's lack of counsel) under §1653 and said: "The purpose of this statute is to permit amendment broadly to avoid dismissal of suits on technical grounds." *Id.* at 412.

Where federal jurisdiction is lacking because of uncertainty in the amount of a claim that defect may be cured by amendment. In the within case concerning the injuries to four passengers, the amount of total claim is one that does not lend itself to an easy evaluation with certainty. It might be added at this juncture that the plaintiff, Alan B. Clark, is a licensed physician with a specialty in neurology. He has, in addition to his injuries, missed various time periods from work which occur intermittently when the effects of his injury combine with the usual ten-

sions of his medical practice. The complaint for damages on behalf of Dr. Clark indicates a demand of $100,000.00 which is in excess of the $25,000.00 amount above which approval from the Attorney General of the United States must be sought to terminate matters, 18 C.F.R. 3142 (*sic.*).

It might also be noted here that two of the other passengers were infants where the amounts of damage are again uncertain, and finally, it is to be noted, that the wife of Dr. Clark was pregnant at the time of the accident. The child born three months after the accident suffers from focal seizures which are caused by a trauma. The child now is only three years old and still cannot be adequately tested, despite the initial diagnosis the trauma has contributed to the present condition of the child.

In *Wexler v. Newman*, 311 F. Supp. 906 (E.D. Pa. 1970), one plaintiff submitted an administrative claim Form 95 for an amount in excess of $10,000.00 on April 20, 1967, under the Federal Tort Claims Act. The next day suit for that amount was constituted in federal district court. Plaintiff contended that his claim did not come within the purview of §2675 requiring final administrative disposition or fifteen days written notice of withdrawal as prerequisite to court action. The court upheld plaintiff's argument ruling that the relevant provisions of the Federal Tort Claims Act are limited in their application to claims for $2,500.00 or less and that, therefore, the claim in excess of $10,000.00 was beyond the jurisdiction of the federal agency. Submission of the claim to the agency was thus "a 'withdrawal' by the claimant as a prerequisite for suit." *Id.* at 903. The Court found further support for this ruling in §2401(b) which provides that "on tort claims against the United States, suit must be instituted within two years after the claim accrues, or, in the case of a claim not exceeding $2,500.00, written claim must be presented

to the appropriate federal agency within two years after the claim accrues or otherwise be forever barred."

According to *Wexler*, where the amount of the claim exceeds $2,500.00, prior administrative procedures are not required for court action, yet it still seems a requirement that claims in excess of that amount must be instituted by suit within two years of accrual. In the instant case, the initial action was filed on August 16, 1972, on a claim accruing on August 17, 1970, and thus should the amount finally be determined as in excess of $2,500.00, according to Wexler, the action is properly brought.

As *Rule* 60(a) provides for relief from a final order where a clerical mistake was in evidence, so does *Rule* 60(b) provide for more substantive reasons. *Rinieri v. News Syndicate Co.*, 385 F.2d 818 (2d Cir. 1967) has held that a dismissal without prejudice is a final order.

In *Barber v. Turberville*, 216 F.2d 34 (D.C. Cir. 1954), defendant suffered a default judgment due to failure of his attorney to file an answer to a complaint or make appropriate appearance when the "complaint became mixed with another file" through oversight of counsel. Subsequently, defendant engaged a new counsel who filed a *Rule* 60(b) motion to vacate the judgment setting forth the grounds of excusable neglect on the part of the former attorney. The court here noted that defendant personally was not negligent in the protection of her interests and in these situations "the courts have been reluctant to attribute to the parties, the errors of their legal representatives." 218 F.2d at 36. Furthermore, the court stated:

> *Rule* . . . 60(b) should be given liberal construction . . . thus, we hold that the record presents a case of excusable neglect and we reverse the judgment and remand the case for a new trial.

The remedy provided by this section is thus of an equitable nature and should be granted to insure justice where a party has been victimized by conduct for which he is not responsible. In *Radack v. Norwegian American Line Agency,* 318 F.2d 538 (1963), a suit was dismissed for lack of timely prosecution.

In *Parapoff v. Vollstedt's Inc.,* 367 F.2d 863 (1959), where plaintiff had waived an effective defense on erroneous advice of counsel, the court held that relief was justified under 60(b)(6). Furthermore, it had been held that such a motion should be received favorably where large sums of money are at stake. *Trueblood v. Grayson Shops, Inc.,* 32 F.R.D. 140 (E.D. Va. 1963). Here defendant's attorney failed to file an answer within the required time and a default judgment was entered. In ruling on the subsequently filed 60(b) motion, the court stated: "Matters involving large sums should not be determined by default judgment if it can reasonably be avoided." *Id.* at 191.

The delay of one day in filing Answer of defendant in Federal District Court was owing to *miscalculation* of time (emphasis supplied) by counsel for defendant, and claim of plaintiff was a substantial one, and defendant set up meritorious defense, default judgment would be vacated. *Wolfsohn v. Raab,* 11 F.R.D. 254 (1951); see also, *Renman v. Shubow,* 413 F.2d 258 (1969) where attorney overslept and failed to answer call.

In short, it seems that the remedy for mistake of former counsel exists under *Rule* 60(b). Only gross neglect of counsel over a long period of time would not justify such relief. In *Schwarz v. U.S.,* 385 F.2d 833, a plaintiff's attorney made virtually no attempt over a period of years to prepare a Federal Tort Claims action and, in

that instance, the Court stated that plaintiff should seek recovery from his attorney. In view of the actions of the former attorney in the within case, as well as the negotiations that provided the filing of the first complaint on August 16, 1972, the result in *Schwarz* (*ibid.*) would be harsh and unfair to the appellants in this matter, as well as their former attorney.

Point III

The Court, in all equity and fairness, can consider changes in the law and, alternatively, can overturn a legal principle where the equity powers of the Court are called upon, where failure to do so would be both unfair to the plaintiffs and a denial of equal protection under the laws.

As stated previously, two of the plaintiffs are infant children. The court is now directed to H.R. 10575, Union Calendar No. 256. The within Bill, which has passed the House of Representatives in both the 91st and 92nd Congress, is entitled, "Amending Section 2401 of Title 28, United States Code, to Extend the Time for Filing Tort Actions by Persons under the Age of 21, or Insane or Mentally Ill, or Imprisoned on a Criminal Charge." In a Report of the 91st Congress, dated November 12, 1969, accompanying the same Amendment, listed as H.R. 10124, the Committee reports that subsection (a) of section 2101 has, for years, provided a similar exception for persons "under legal disability." In the opinion of the committee, this provides a well-established precedent for a parallel provision applicable to tort actions. It is felt that the application and the meaning of the term "under legal disability" has been established in the application of that term in connection with the Statute of Limitations for actions covered by subsection (a) of the same section. The

use of this term in subsection (a) dates from its inclusion in the subsection when title 28 was enacted as a codified title by Public Law 773 of the 80th Congress on June 25, 1948 (ch. 646, 62 Stat. 869, 971).

The language now recommended by the committee in H.R. 1021, as amended, will have the same effect. Were it not for the previous history of section 2401, it might be assumed that the exception in subsection (a) would also apply to subsection (b). As has been noted, the section in its present form is the result of a combination of the limitations relating to the so-called Tucker Act.[1] in subsection (a) and the limitations concerning the Tort Claims Act in subsection (b). This situation was discussed in the case of *U.S. v. Glenn*, 231 F.2d 884, *cert. denied* 252 U.S. 928 (1888). In that case, the plaintiff attempted to argue that the exception in subsection (a) should apply to tort claims actions as well. In that action, the plaintiff was child who was dropped to the floor and suffered a head injury at the time he was born in a naval hospital at Seattle, Wash.

The court examined the legislative history and concluded that the subsections are mutually exclusive. The court referred briefly to the arguments by parties to the action as to the reasons both for and against an exception to the running of the Statute as to minors, and concluded that a determination on this point was a matter of policy for the Congress. Other cases have also made it clear that subsection 2401(b) permits no waiver or tolling of the Statute of Limitations in the cases of legal disability such as a minority of the claimant at the time the action accrues. *Bittman v. U.S.*, 341 F.2d 737, *cert. denied* 382 U.S. 941 (1965) and cases cited therein.

1. Act of March 3, 1887, 19th Cong., second sess., ch. 359, 24 Stat. 505; act of March 3, 1911, ch. 231, 36 Stat. 1087, 1091.

"Sound judicial discretion may call for modification of injunctive decree if circumstances, whether in law or fact, obtaining at time of issuance have changed, or new ones have since arisen." System Federation #91, *Ry. Emp. Dept. AFL-CIO v. Wright*, 81 S. Ct. 368, 364 U.S. 542. On motion to modify injunctive decree, balance must be struct between policy of *Res. Judicata* and right of Court to apply modified measures to change circumstances, *Hood v. McConemy*, 53 F.R.D. 435.

Although the plaintiffs consist of two classes, to wit: infant plaintiffs and adult plaintiffs, it is the contention of the appellants that a Court using equitable principles, to facilitate justice, should not be bound only by legal principles merely because they have been upheld over a period of years.

The Court is now directed to the dynamics of changing legal principles, as evident by the *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Brown v. Board of Education v. Topeka, Kansas*, 347 U.S. 483 (1955), sequence of cases. In *Brown v. Board of Education v. Topeka, Kansas* (*supra*), Chief Justice Warren, in a landmark decision reversed *Plessy v. Ferguson*, (*supra*), involving equality of transportation facilities, under which equality of treatment is accorded by providing Negroes and whites substantially equal, though separate facilities. At page 489—the doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of *Plessy v. Ferguson* (*supra*), involving not education, but transportation. American courts have labored with the doctrine for over half a century. In six cases involving education, the doctrine was not challenged, see *Cummings v. County Board of Education*, 175 U.S. 5281, *Berea College v. Kentucky*, 211 U.S. 45, and *Cong Lum v. Rice*, 273 U.S. 78.

In none of the cases was it considered necessary to reexamine the doctrine to grant relief to the Negro plaintiffs.

The beauty of the ever-changing law is more forcefully brought home when one considers that one of the Justices sitting on the unanimous court in the *Brown* case was Associate Justice Harlan who was the grandson of the Justice Harlan who dissented in the *Plessy v. Ferguson case.*

It is the contention of the appellants that the rules as to substantial compliance with the Federal Tort Claims Act and with the tolling of the Statute of Limitations as to the claims of infants should, like the "separate but equal" doctrine of *Plessy v. Ferguson,* be reexamined. A closer look at the "Great Dissenter" Justice Harlan in *Plessy v. Ferguson* is in order.

"Our constitution is color-blind, and neither knows or tolerates classes among its citizens."

Justice Harlan, in his dissent in *Plessy* (*supra*) refers to the 14th Amendment which applies here as well. . . . "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person within its jurisdiction the equal protection of the laws . . . ." Justice Harlan referred to the 13th, 14th and 15th Amendments as worthy *additions* (emphasis supplied) to fundamental law, welcomed by the friends of liberty throughout the world. (*Plessy, supra,* at page 665.)

While in the instant case, appellants concede the large number of cases stating that a sovereign cannot be sued without strict compliance to its statutory rules, the appellants cite the conceptual grandeur of the Law as evidenced by the *Plessy v. Ferguson, Brown v. Board of Education* series of cases whereby there was an adoption of a minor-

ity opinion fifty years later by a unanimous Supreme Court because of the *elemental fairness and correctness of that dissent.* (emphasis supplied). The appellants in the within case are now appealing to that same sense of elemental fairness and correctness in providing the appellants with the opportunity to have their case heard on its merits.

The Supreme Court has on other occasions reversed a body of cases where fairness called for a brave Court to seed a new road in overturning precedents. In *Loving v. Virginia,* 388 U.S. (1967) an anti-mescegenation statute was overturned in holding that the Virginia anti-mescegenation statute violated both unequal protection and the due process clauses of the 14th Amendment, Chief Justice Warren and the Supreme Court reversed a body of law that had continually been supported by the Courts. To allow for a strict interpretation of the Federal Tort Claims Act would deprive the appellants of their rights of due process and equal protection under the Fifth and Fourteenth Amendments in a manner which would not be allowed if it were done by a State Government. The Federal Tort Claims Act, in effect, creates a new class of people, *i.e.,* the claimant under the Federal Tort Claims Statute. A right provided by a Federal Constitution is denied them, although a subdivision of the sovereign (the State) would, under the Fourteenth Amendment, not be allowed to enact special legislation such as allowing only plaintiffs who wore blue suits to sue the Government.

The Federal Tort Claims Act was enacted to be remedial legislation. The legislative history of the Federal Tort Claims Act intended the Statute to be liberally interpreted and to be remedial. A parallel exists in the State of New Jersey in the enactment of the Unsatisfied Judgment Claim Board to protect motorists and pedes-

trians from uninsured motorists, who may cause accidents whereby they suffer injuries.

Finally, it is respectfully brought to this Court's attention that the Circuit Court of Appeals advised the undersigned attorney for the petitioner that part of the statement of facts was missing from the copies of the Brief that were provided. The decision to disallow the plaintiff's allowed oral argument came the same day that the additional statement of facts was mailed to the Court. The decision to deny the plaintiff's request for reversal of the district court's decision and a chance to have the case heard on its merits came two days after the statement of facts was submitted.

CONCLUSION

For the above cited reasons, the petitioners ask this Court for a hearing as to whether the plaintiffs can be given the opportunity to have their case heard on its merits.

This case, at this point, has been one of *procedure*. The merits of the plaintiffs' case, particularly that of a child unborn at the time of the accident, have, in fact, never been heard. Several Congressmen have expressed interest in this matter and it is urged that this court at least consider hearing this matter in its entirety so that this matter can be brought to the public's attention.

Respectfully,

/s/ Marvin S. Davidson
MARVIN S. DAVIDSON
Attorney for Petitioners

APPENDIX "A"

Opinion of the United States Court of Appeals for the Third Circuit by Albert B. Maris, Circuit Judge

The opinion of the United States Court of Appeals for the Third Circuit, announced on October 11, 1974, is as follows:

"The above cause having been submitted to the Court and the Court being of the opinion after full consideration, that the district court did not err in dismissing the plaintiffs' complaint with prejudice, since it appears that the plaintiffs failed to file within the time required by 28 U.S.C. §2401 (b) an administrative claim in the form required by 28 U.S.C. §2675 (a) and 28 C.F.R. §14.2 (a) and that strict compliance with those requirements is jurisdictional, *United States v. Sherwood*, 1941, 312 U.S. 584; *Bialowas v. United States*, 3 Cir. 1971, 443 A.2d 1047.

It is ADJUDGED and ORDERED that the judgment of the district court be, and it hereby is, affirmed. Costs taxed against appellants.

By the Court.

ALBERT B. MARIS
Circuit Judge

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1139

ALAN B. CLARK, ET AL., PETITIONERS

v.

JERRY STANKIVIC

AND

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that, notwithstanding their failure to file a timely written claim for a specific sum to the appropriate federal agency, pursuant to the Federal Tort Claims Act, 28 U.S.C. 2675(a) and 2401(b), they are in substantial compliance with the statutory requirements; alternatively, their failure to file an appropriate claim was excusable neglect under Rule 60(b), Fed. R. Civ. P.; and in any event this Court should grant them the relief they seek in light of pending legislation.

On August 16, 1972, petitioners Dr. Alan B. Clark and his wife Pansy Clark commenced this Federal Tort Claims Act suit in the United States District Court for the District of New Jersey, on behalf of themselves and their two minor children, seeking damages in excess of $165,000. They alleged that they were injured on August 17, 1970 when their family car was struck by a United States Army vehicle negligently driven by Army Warrant Officer Jerry Stankivic. On December 11, 1972, the district court dismissed the complaint without prejudice for petitioners' failure to comply with 28 U.S.C. 2675, which requires, *inter alia,* that a claim against the United States for money damages for injuries first be presented in writing to the appropriate federal agency.[1]

Petitioners then filed an administrative claim with the Department of the Army. The claim was denied by the Department as untimely under 28 U.S.C. 2401(b), which provides that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues * * *." Since the claim accrued August 17, 1970, the time for filing an administrative claim had expired August 17, 1972.

On May 8, 1973, petitioners filed a second complaint in the district court, again based upon the accident which occurred on August 17, 1970, seeking $180,000 in damages. The district court dismissed this action with prejudice as barred by 28 U.S.C. 2401(b). On appeal, the court of appeals summarily affirmed (Pet. App. 1a).

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[1]Petitioners were furnished claim forms (Standard Claim Form 95) by the Department of the Army and instructed that the forms should be fully executed to state all damages claimed. However, the forms were not submitted to the Department prior to the institution of the action (Addendum to Court of Appeals Brief for the Appellees, 3a-9a).

1. Petitioners do not dispute that they failed to submit a timely written claim for a specific sum to the Department of the Army. Instead, they contend that they are in "substantial compliance" with the applicable statutes because their attorney attempted to negotiate a settlement by telephone with counsel for the government within the two-year limitations period (Pet. 7). Section 2675(a) expressly requires that a claim be made "in writing," however, and the governing regulation, 28 C.F.R. 14.2 (a),[2] requires that the claimant demand a "sum certain." Accordingly, vague oral negotiations do not constitute "substantial compliance" with the Federal Tort Claims Act. *Bialowas* v. *United States*, 443 F.2d 1047, 1049-1050 (C.A. 3). Unless a written claim for a "sum certain" is submitted to the appropriate federal agency within two years after the cause of action accrues, the requirements of Sections 2675(a) and 2401(b) are not satisfied. *Melo* v. *United States*, 505 F.2d 1026 (C.A. 8); *Avril* v. *United States*, 461 F.2d 1090 (C.A. 9); *Caton* v. *United States*, 495 F.2d 635 (C.A. 9); *Best Bearings Co.* v. *United States*, 463 F.2d 1177 (C.A. 7); *Ianni* v. *United States*, 457 F.2d 804 (C.A. 6); *Meeker* v. *United States*, 435 F.2d 1219 (C.A. 8); *Johnson* v. *United States*, 404 F.2d 22 (C.A. 5).

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[2]28 C.F.R. 14.2(a) pertinently provides:

> (a) For the purposes of the provisions of section 2672 of Title 28, United States Code, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident.

2. Alternatively, petitioners maintain that their attorney's failure to file an appropriate written claim for a sum certain constitutes "excusable neglect" pursuant to Rule 60(b), Fed. R. Civ. P. However, that Rule solely applies to "relief from judgment or order," not to relief from procedural prerequisites for obtaining damages from the government.

Little v. *United States*, 317 F. Supp. 8 (E.D. Pa.) and *Rabovsky* v. *United States*, 265 F. Supp. 587 (D. Conn.), upon which petitioners rely (Pet. 12-14), are inapposite, since Rule 60(b) was not invoked in these cases. Moreover, while the district courts in these cases permitted the claimants to correct timely-filed written claims to reflect more accurately the damages intended to be claimed, in the instant case the claimants failed to file any timely written claim as required by 28 U.S.C. 2675(a) and 28 U.S.C. 2401(b).

In any event, since Tort Claims Act limitations are jurisdictional, they cannot be avoided by a plea of mistake, inadvertence or clerical error. *Soriano* v. *United States*, 352 U.S. 270, 276; *Bialowas* v. *United States*, *supra*, 443 F.2d at 1049.

3. Finally, petitioners suggest that this Court disregard existing law and grant them relief because Congress is considering certain legislative proposals which would extend the time for filing personal injury actions brought by or on behalf of minors. This Court must, however, apply the law as it has been enacted by the Congress until such time as it is changed by legislative action.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1975.